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Shu Fong Yean v CIMB Bank Bhd & Anor

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCVC-3698–10 OF 2022
LEONG WAI HONG JC
3 APRIL 2023

C *Land Law — Charge — Order for sale — Whether order for sale was bad because chargee had claimed interest on loan even after one of the two chargors was adjudged bankrupt — Whether under s 44(1) Contracts Act 1950 both chargors were jointly and severally liable to repay full amount due under the loan even though one of them had been declared bankrupt — Whether that position was further fortified by clause in charge annexure which chargors had agreed to — Bankruptcy Act 1967 (now Insolvency Act 1967) s 8(2A)*

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The plaintiff and the second defendant ('D2') jointly owned a property which they charged to the first defendant ('CIMB') in order to obtain a housing loan. When the said chargors defaulted in repaying the loan, CIMB obtained an order for sale of the charged property in July 2019. More than three years later, in October 2022, the plaintiff made the instant application — without explaining the reason for its delay in doing so — to set aside the order for sale on two grounds. First, that CIMB had not complied with s 8(2A) of the Bankruptcy Act 1967 in that it had claimed interest on the loan even after D2 was adjudged a bankrupt in June 2017. Secondly, CIMB's affidavit in support of its application for the order for sale failed to comply with O 83 r 3(3) of the Rules of Court 2012 ('the ROC') in that the particulars of the amount remaining due under the charge as at the date of hearing of its order for sale application were not furnished. CIMB opposed the plaintiff's application on the ground that: (a) the plaintiff had not explained the inordinate delay in her application; (b) CIMB was entitled to claim interest on the loan even after D2's bankruptcy because both the plaintiff and D2 were joint borrowers of the loan and their obligation to repay the full sum due under the loan was joint and several. Clause 2.1(b) of the Charge Annexure also expressly stated that if one of the borrowers was adjudged a bankrupt, then the other borrower who was not a bankrupt was legally obliged to pay the interest accruing on the loan notwithstanding s 8(2A) of the Bankruptcy Act; and (b) CIMB had given the particulars that were required under O 83 of the ROC when it applied for the order for sale.

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Held, dismissing the plaintiff's application:

(1) Under s 44(1) of the Contracts Act 1950, joint borrowers of a loan were, in the absence of an express agreement to the contrary, each liable to the lender to repay the full liability under the loan. In addition, cl 2.1 of the charge annexure expressly stated that in the event one of the borrowers was declared a bankrupt, the other non-bankrupt borrower (which would be the plaintiff in this case) was legally obliged to pay the interest accruing under the loan notwithstanding s 8(2A) of the Bankruptcy Act 1967. The plaintiff had signed the charge and was bound by its terms (see paras 47–46 & 49).

(2) The court agreed with CIMB that O 83 r 3 of the ROC had no application as CIMB did not claim for delivery of possession. In any event, even if that provision was applicable, CIMB had given particulars of the amount remaining due under the charge at the date of hearing of its application for the order for sale. The plaintiff did not identify what were the 'particulars' that CIMB had failed to furnish. Under the old O 83 of the Rules of Court 1980, the chargee was required to state various particulars, such as the amount of the advance, the amount of the repayments, the amount of any interest or instalments in arrears at the date of issue of the originating summons for the order for sale and at the date of the affidavit and the amount remaining due under the charge. The requirement to state all these particulars was deleted under the new O 83 r 3(3) of the ROC and all that the chargee was now required to declare under rr 3(3) and 3(6) of O 83 was the amount remaining due under the charge at the date of the hearing, and this requirement CIMB had complied with (see paras 52–59).

(3) The plaintiff had failed to explain the reason for her delay in applying to set aside the order for sale (see para 41).

(4) The grounds raised by the plaintiff merely related to alleged procedural contraventions and did not concern illegality, lack of jurisdiction or fraud. Hence, the decision of the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 had no application in the instant case (see paras 3 & 40).

[Bahasa Malaysia summary

Plaintif dan defendan kedua ('D2') memiliki hartanah bersama yang mereka gadai kepada defendan pertama ('CIMB') untuk mendapatkan pinjaman perumahan. Apabila penggadai tersebut gagal membayar balik pinjaman, CIMB memperoleh perintah penjualan harta yang digadai pada Julai 2019. Lebih tiga tahun kemudian, pada Oktober 2022, plaintif membuat permohonan semasa — tanpa menjelaskan sebab kelewatannya dalam berbuat demikian — untuk mengetepikan perintah jualan atas dua alasan. Pertama, CIMB tidak mematuhi s 8(2A) Akta Kebankrapan 1967 kerana ia telah menuntut faedah ke atas pinjaman tersebut walaupun selepas D2

diadjudikasikan bankrap pada Jun 2017. Kedua, afidavit CIMB untuk menyokong permohonannya untuk perintah jualan gagal mematuhi A 83 k 3(3) Kaedah-Kaedah Mahkamah 2012 ('KKM') di mana butir-butir amaun baki yang perlu dibayar di bawah gadaian pada tarikh pendengaran permohonan perintah jualannya tidak dikemukakan. CIMB menentang permohonan plaintif atas alasan bahawa: (a) plaintif tidak menjelaskan kelewatan yang melampau dalam permohonannya; (b) CIMB berhak menuntut faedah ke atas pinjaman walaupun selepas kebankrapan D2 kerana kedua-dua plaintif dan D2 adalah peminjam bersama pinjaman dan kewajipan mereka untuk membayar balik jumlah penuh yang perlu dibayar di bawah pinjaman adalah bersama dan berasingan. Klausa 2.1(b) Lampiran Gadaian juga menyatakan dengan jelas bahawa jika salah seorang daripada peminjam telah diadjudikasi bankrap, maka peminjam lain yang bukan bankrap adalah diwajibkan secara sah untuk membayar faedah yang terakru ke atas pinjaman tersebut tidak mengambilkira s 8(2A) Akta Kebankrapan; and (c) CIMB telah memberikan butir-butir yang diperlukan di bawah A 83 KKM apabila ia memohon perintah jualan.

Diputuskan, menolak permohonan plaintif:

(1) Di bawah s 44(1) Akta Kontrak 1950, peminjam bersama pinjaman, jika tiada perjanjian nyata sebaliknya, masing-masing bertanggungjawab kepada pemberi pinjaman untuk membayar balik liabiliti penuh di bawah pinjaman tersebut. Di samping itu, klausa 2.1 lampiran gadaian menyatakan dengan jelas bahawa sekiranya salah seorang daripada peminjam diisytiharkan bankrap, peminjam bukan bankrap yang lain (yang akan menjadi plaintif dalam kes ini) diwajibkan secara sah untuk membayar faedah yang terakru di bawah pinjaman tanpa mengambilkira s 8(2A) Akta Kebankrapan 1967. Plaintif telah menandatangani gadaian dan terikat dengan termanya (lihat perenggan 47–46 & 49).

(2) Mahkamah bersetuju dengan CIMB bahawa A 83 k 3 KKM tidak terpakai kerana CIMB tidak menuntut untuk penyerahan milikan. Dalam apa jua keadaan, jika mana peruntukan tersebut terpakai, CIMB telah memberikan butir-butir mengenai jumlah baki yang perlu dibayar di bawah gadaian pada tarikh pendengaran permohonannya untuk perintah jualan. Plaintif tidak mengenal pasti apakah 'butir-butir' yang gagal diberikan oleh CIMB. Di bawah A 83 lama Kaedah-Kaedah Mahkamah 1980, pemegang gadaian dikehendaki menyatakan pelbagai butiran, seperti amaun pendahuluan, amaun bayaran balik, amaun apa-apa faedah atau ansuran tertunggak pada tarikh pengeluaran saman pemula untuk perintah jualan dan pada tarikh afidavit dan amaun yang masih perlu dibayar di bawah gadaian. Keperluan untuk menyatakan semua butiran ini telah dipadamkan di bawah A 83 k 3(3) KKM baharu dan semua yang kini perlu diisytiharkan oleh pemegang gadaian di bawah A 83 kk 3(3) dan 3(6) adalah jumlah yang baki kena dibayar di

bawah gadaian pada tarikh pendengaran, dan keperluan ini telah dipatuhi oleh CIMB (lihat perenggan 52–59).

(3) Plaintif telah gagal menjelaskan sebab kelewatannya dalam memohon untuk mengetepikan perintah jualan (lihat perenggan 41).

(4) Alasan yang dibangkitkan oleh plaintif semata-mata berkaitan dengan dakwaan pelanggaran prosedur dan tidak melibatkan ketidakadilan, kekurangan bidang kuasa atau penipuan. Oleh itu, keputusan Mahkamah Persekutuan dalam *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 tidak terpakai dalam kes semasa (lihat perenggan 3 & 40).]

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (distd)

CIMB Islamic Bank Bhd v David Chua Kok Tee [2022] MLJU 537, HC (refd)

David Cheah Seng Chye (bringing this action for and on behalf oh himself and the beneficiaries of the estate of Cheah Leong Keah, deceased) v So Miau Song & Ors and other appeals [2023] 3 MLJ 726, CA (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622, FC (refd)

Kiranjit Kaur a/p Dr Jagjit Singh (menyaman dalam keupayaan sebagai pentadbir bersama harta pusaka Suresh a/l Thanabalasingam, si mati) v Thamabalasingam @ Thanabalasingam (disaman dalam keupayaan sebagai pentadbir bersama harta pusaka Suresh a/l Thanabalasingam, si mati) [2022] MLJU 829; [2022] 6 MLRH 549, HC (refd)

Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie [2021] 5 MLJ 253, FC (folld)

Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd [2003] 4 MLJ 409, CA (refd)

Malayan Banking Bhd v Koay Kang Chuwan & Anor [2010] 5 MLJ 46, CA (refd)

Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd [2006] 5 MLJ 21, FC (refd)

Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30, FC (refd)

Legislation referred to

Bankruptcy Act 1967 (now Insolvency Act 1967) s 8(2A)
Contracts Act 1950 s 44(1)
Malay Reservations Enactment (FMS Cap 142) s 13
Rules of Court 2012 O 83 r 3(3)
Rules of the High Court 1980 (repealed by Rules of Court 2012) O 83 r 3(1)

Lau Yi Leong (Ling & Yi Leong) for the plaintiff.
Lee Tze Jiun (Zairina Loh & Wong) for the first defendant.
Norizan bt Omar (Malaysian Department of Insolvency) for the second defendant.

Leong Wai Hong JC:

INTRODUCTION

[1] This is an originating summons filed by the plaintiff on 28 October 2022 to set aside an order for sale granted by the KL High Court more than three years ago on 2 July 2019 ('order for sale').

[2] The acute issue brought into focus in this originating summons is the scope and ambit of the Federal Court decision of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (FC) ('Badiaddin').

[3] The plaintiff argues that *Badiaddin* allows her to come to court at any time to set aside the order for sale without the need for an appeal, and notwithstanding the passage of time without the need to justify the delay in her application.

[4] For the plaintiff's learned counsel to assert that any delay in the plaintiff's application is not relevant and thus need not be explained, I say at the outset I do not accept. That would 'be going *a bridge too far*', to quote the opinion of a worried Lieutenant General Frederick Browning to Field Marshal Montgomery during the final conference on Operation Market-Garden. This quote, since immortalised in Cornelius Ryan's World War 2 classic *A Bridge Too Far*, and the similarly titled movie, has become an idiom in the English language to denote an act of overreaching for something.

[5] The order for sale was granted in the foreclosure originating summons because the chargors (the plaintiff and the second defendant in this originating summons) failed to repay the loan owed to the chargee/the first defendant in this originating summons ('CIMB').

[6] The plaintiff contends the order for sale should be set aside because:

(a) this court has jurisdiction to set aside the order for sale;

(b) the order for sale did not comply with s 8(2A) of the Bankruptcy Act 1967 as CIMB had claimed for interest accruing on the loan after the making of the receiving order on the second defendant on 25 June 2017; and

(c) the supporting affidavit affirmed in the foreclosure originating

summons, by CIMB, failed to comply with O 83 r 3(3) of the Rules of Court 2012 as *no particulars* of the amount remaining due under the charge as at the hearing date of the originating summons was furnished. (Emphasis added.)

[7] CIMB resists this originating summons on the following grounds:

(a) the order for sale once sealed cannot be set aside as the court is functus officio (Latin for having performed his duty, having served its purpose). An appeal must be filed if the plaintiff wishes to set aside the order;

(b) the plaintiff must file the setting aside within the same proceedings or action in which the order for sale was obtained and not in a separate fresh proceeding or new action;

(c) there was inordinate delay as this originating summons was filed on 28 October 2022 when the order for sale was granted on 2 July 2019. No explanation was given for the delay;

(d) CIMB was entitled to claim for interest post the bankruptcy of the second defendant as the plaintiff and second defendant were joint borrowers under the loan and owed a joint and several liability to CIMB. Clause 2.1(b) of the charges states expressly that in the event one of the borrowers is declared a bankrupt the other borrower ie the plaintiff, who is not a bankrupt, is under a legal obligation to pay interest notwithstanding s 8(2A) of the Bankruptcy Act 1967; and

(e) the supporting affidavit affirmed in the foreclosure originating summons, by CIMB, had complied with O 83 r 3(3) of the Rules of Court 2012 as *particulars* of the amount remaining due under the charge as at the hearing date of the originating summons were furnished. (Emphasis added.)

[8] The second defendant in this originating summons was made a bankrupt on 25 June 2017. The Insolvency Department officer was present at the hearing before me on 9 February 2023 but did not make any submissions.

[9] I dismissed the originating summons on 9 February 2023. The plaintiff has filed an appeal to the Court of Appeal. These are my grounds of decision.

BACKGROUND FACTS

[10] The background facts are basically undisputed.

[11] The plaintiff and the second defendant are registered proprietors of a property. In exchange for two housing loan facilities they created two charges in 2007 and 2011 in favour of CIMB.

[12] The second defendant was made a bankrupt on 25 June 2017. The grievance of the plaintiff is that CIMB did not take steps to realise the property within six months from 25 June 2017 (see supporting affidavit at para 8).

[13] However, it should be noted that there is no evidence put before this court that there was default in the loan repayments by the plaintiff in the years 2017 and 2018.

[14] The evidence put before this court is that the default in repayment happened on or about February 2019 when CIMB's solicitors terminated and recalled the loan facilities by a letter dated 13 February 2019 sent to the plaintiff and the second defendant (see supporting affidavit at para 9).

[15] CIMB then applied to court in KLHC Originating Summons No WA-24FC-526–05 of 2019 and obtained the order for sale on 2 July 2019 (see supporting affidavit at exh S1).

[16] There is no evidence put before this court that the plaintiff and the second defendant resisted the order for sale. The order for sale says they were absent (see supporting affidavit at exh S2).

[17] When CIMB took steps to enforce the order for sale the plaintiff's solicitors appeared to resist the reduction of the reserve price (see *afidavit jawapan defendan pertama* paras 10(a)–(e) and exh L1 and L2).

[18] CIMB then agreed to withdraw the enforcement of the order for sale after the plaintiff and the second defendant suggested to CIMB to reschedule their repayments (see *afidavit jawapan defendan pertama* at para 10(f)).

[19] However, no settlement was achieved. So CIMB resumed the enforcement of the order for sale. The plaintiff via her solicitors then requested for the redemption statement. This was supplied by CIMB on 17 August 2022 but the loan was not repaid and the charge not redeemed by the plaintiff (see *afidavit jawapan defendan pertama* at para 10(g) to (l)).

COURT PROCEEDINGS

[20] Thereafter, the plaintiff filed this originating summons in an attempt to set aside the order for sale.

ISSUES BEFORE THIS COURT

Does this court have jurisdiction to set aside the order for sale based on Badiaddin?

[21] I begin by examining the law prior to *Badiaddin.*

The law prior to *Badiaddin*

[22] Prior to *Badiaddin*, a fresh suit can only be filed to set aside a judgment regularly obtained that has been drawn up if the order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming. The fact that the order is made in breach of statute and is illegal is not a ground for a fresh suit to set aside the earlier order. This is the decision of the Federal Court in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 where Chang Min Tat FCJ said:

> *Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up,* except under the slip rule ... so far as is necessary to correct errors in expressing the intention of the court: ... unless it is a judgment by default or made in the absence of a party at the trial or hearing. *But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment:* ... (Emphasis added)

On *Badiaddin*

[23] Subsequently, in 1998 the Federal Court in *Badiaddin* added a further exception to the two categories of fraud or further evidence set out in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143.

[24] I begin by examining the ratio decidendi (a Latin phrase meaning 'the reason' or 'the rationale for the decision') of *Badiaddin*.

[25] In *Badiaddin* the Federal Court held that in 'exceptional cases' even if there is no fraud or further evidence involved, a losing party need not appeal, but can subsequently file a fresh action to set aside the earlier final order that had been regularly obtained and drawn up. This fresh action is not barred by the doctrines of functuos officio or res judicata.

[26] What then are these 'exceptional cases'? In *Badiaddin* the grounds of judgment of Mohd Azmi FCJ had the agreement of Eusoff Chin CJ and Wan Adnan FCJ. Gopal Sri Ram JCA issued a separate grounds of judgment ad idem (Latin meaning 'meeting of minds') with Mohd Azmi FCJ. Peh Swee Chin FCJ also issued a separate grounds of judgment but he disagreed with the

reasoning of the other four judges. Thus, Justice Peh in effect was the dissenting judge in the ratio decidendi of *Badiaddin*!

[27] In his seminal passage for the majority judgment, Mohd Azmi FCJ said at p 409:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. *But one special exception* to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) *is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction* so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make'.
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> *The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door* as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, *'save that specifically it includes orders that have been obtained in breach of rules of natural justice'* ...
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> For my part, I must hasten to add that *apart from breach of rules of natural justice*, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law'*, the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not* for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be *exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice.* In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception. (Emphasis added.)

[28] In his separate grounds of judgment Gopal Sri Ram JCA said at p 426E:

> It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may make orders in breach of written law ... I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. *But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be*

declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, *upon the illegality being clearly shown,* to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal. (Emphasis original and also added.)

[29] As stated earlier, Peh Swee Chin FCJ in his separate grounds of judgment disagreed with the reasoning of the other four judges. He said at:

Page 413 D:

I have read all the written grounds of judgment since the conclusion of the hearing of the appeal when we allowed the appeal thereat with costs and set aside the order of the court below. *It is my misfortune and sorrow as well that I have been unable to agree with such grounds or reasoning* and perforce with the greatest respect I have to give my point of view to which I have also committed myself in certain earlier judgments which I have delivered ...

Page 418F to 419 H:

I now deal with illegality as a ground for setting aside a previously perfected order (ie the said previous order) made in another action by filing a fresh action or proceeding out of time of an appeal against the said previous order. It will be remembered the second order of sale of the said land was set aside by all other members of the Federal Court on ground of illegality because of s 13 of the said Enactment.

It is true that the Federal Court in *Hock Hua Bank v Sahari bin Murid* did say that a judgment could be set aside or impeached in a subsequent fresh action on the ground that such judgment was obtained, eg by fraud. Would it follow that if fraud in obtaining a judgment is sufficient as a ground, a fortiori, illegality touching a judgment would also suffice similarly for setting it aside? My answer to this is negative. Now, the case of *Hock Hua Bank v Sahari bin Murid does not mention such a ground of illegality* ...

If a party complains of an illegality in a contract, eg when the consideration or object of the agreement is forbidden by statute and therefore unlawful, he must plead it or the court itself takes judicial notice of it when the contract is ex facie illegal or evidence about it clearly emerges in court. All these presupposedly must take place and must have taken place either at the trial of the first instance, or in any direct appeal to a higher court therefrom as the case may be. *The court if it did not deal with the illegality in any way aforesaid, would be functus officio and cannot take the point after a judgment is perfected*, the point not being one of the exceptions covered by, eg the ratio of *Hock Hua Bank v Sahari bin Murid*. Further, a point of illegality could not be reserved by a litigant for future use without deploying it at the trial or in an appeal therefrom. A court cannot outside the scope of such trial and such appeal therefrom at any time thereafter take judicial notice of such point pleaded as an afterthought in a later action filed also as an afterthought. The doctrine of res judicata, it having been based, inter alia, also on the high policy of interest *rei publicae ut finis litium*, would prevent these afterthoughts (see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 and *Scotch Leasing Sdn Bhd (in receivership) v Chee Pok Choy & Ors)*. (Emphasis added.)

[30] The dissenting reasoning of Peh Swee Chin FCJ found support in a subsequent Federal Court decision. The correctness of the majority reasoning in *Badiaddin* was doubted by Abdul Hamid Mohamad CJ in *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622 (FC) ('Staghorn').

[31] This is what Abdul Hamid Mohamad CJ said in *Staghorn*:

> [74] *It is not my intention to* make a detailed analysis or *give any final opinion on Badiaddin's case*, except to make a few points. First, in *Badiaddin*, the appellants commenced a fresh action to have the second order of the High Court declared null and void and to have it set aside on the ground that it contravened the provisions of s 13 of the Malay Reservations Enactment (FMS Cap 142.) This court in that case was dealing with the inherent jurisdiction of the court to set aside a final order. *The judgment of this court on that issue was a split decision: Mohd Azmi FCJ and Gopal Sri Ram JCA were of the view that it could be done while Peh Swee Chin FCJ disagreed.* Even Azmi FCJ talked about the 'extraordinary circumstances' of the case and said that 'the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction'. The learned judge further added that 'The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice.
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> [75] ... So, *Badiaddin*, at that stage, is not relevant. *So, even if Badiaddin is good law,* it is not relevant in an application to intervene under O 15 r 6 of the RHC. *It is, as in that case, relevant in considering whether the previous order of the court could be set aside, in a fresh action.*
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> [76] Secondly, *it is one thing for the apex court to look at the order of a lower court and say that the order is null and void because it contravenes a written law*, especially as in *Badiaddin* where the contravention is glaring. But, let us reverse the position. *Let us assume that a case has reached the Federal Court and that the Federal Court has made an order. Subsequently, the losing party commences a fresh action in the High Court to set aside the order on the ground of illegality for contravention with a written law*. *Following Badiaddin* and the dictum in Eu Finance Bhd *the High Court would be at liberty to reopen the case, declare the Federal Court order null and void and set it aside! I dread to think of such a situation.*
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> [77] Even where it involves a judgment of a court of co-ordinate jurisdiction, a second judge scrutinizing an earlier judgment or order of another judge may easily find a point which he disagrees with, even in law. Maybe that point was not even raised or argued before the first judge. *As a matter of judicial policy, should the second judge be allowed to reopen the case, set aside the earlier judgment or order and substitute it with his own?* If he can do it, why can't a third judge do the same with the second judge's order, and so on? That will encourage 'judge shopping.' The same process can also happen at every level of the court system.
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> [78] The abuse voiced by Peh Swee Chin FCJ eg where he said 'Further, a point of illegality could not be reserved by a litigant for future use without deploying it at the

trial or in an appeal therefrom' should not be taken lightly. That is exactly what had happened in this case. (Emphasis added.)

[32] In the recent Court of Appeal case of *David Cheah Seng Chye (bringing this action for and on behalf oh himself and the beneficiaries of the estate of Cheah Leong Keah, deceased) v So Miau Song & Ors and other appeals* [2023] 3 MLJ 726 CA after reviewing *Badiaddin,* Lim Chong Fong JCA said:

> [49] ... a plaintiff may only initiate a fresh action to impeach a regular judgment earlier obtained in the original action *in limited categories of illegality, lack of jurisdiction or fraud.* (Emphasis added)

Is delay in filing the fresh suit a relevant factor?

[33] Whether or not delay bars the filing of the fresh suit and whether the delay needs to be explained were not considered by the Federal Court in *Badiaddin.* The facts in *Badiaddin* show that the fresh suit was filed in 1995 to declare an order for sale made on 8 October 1990 null and void and to have it set aside on the ground that it contravened s 13 of the Malay Reservations Enactment (FMS Cap 142) (see *Badiaddin* at p 415D and 424D).

[34] The plaintiff submits that delay is not a relevant factor. The plaintiff submits that in an application to set aside an order for sale granted in the absence of the chargor or its solicitors though duly served, the Federal Court in *Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd* [2006] 5 MLJ 21 (FC) by a 2–1 majority decision allowed the application though the delay was close to five years (see grounds of judgment paras [13] and [142]. This is what PS Gill FCJ said:

> [142] *As to the question of delay in applying to set aside the order for sale by the respondent, in our view, lapse of time is no bar to the respondent's application to set aside an order for sale that is so fundamentally flawed.* We are supported by the following passage in a judgment of the Federal Court in case of *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at p 42
>
> Nevertheless, *it is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied* that:
>
> (a) no one has suffered prejudice by reason of the defendant's delay;
>
> (b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or
>
> (c) to let the judgment to stand would constitute oppression (see *Atwood v Chichester* (1878) 3 QBD 722; *Harley v Samson* (1914) 30 TLR 450). (Emphasis added.)

[35] CIMB countered by relying on *Malayan Banking Bhd v Koay Kang*

Chuwan & Anor [2010] 5 MLJ 46 where Abdul Malik Ishak JCA said:

> [37] The third ground was worded in this way. *That the learned judge of the High Court erred in law in failing to dismiss the first respondent's application to set aside the order for sale after a delay of ten years without giving any valid or reasonable reason for the delay.*
>
> [38] It cannot be doubted that *there was an inordinate delay of exactly 12 years nine months and six days* ...At any rate, I have perused through the affidavit in support in question and it contained precious little. *It failed to depose to any valid or reasonable reason for the extremely long delay* ...
>
> [40] *It is our judgment that once the question of delay has been resolved in favour of the appellant bank, the merits of the appeal need not be examined.*
>
> [41] Gopal Sri Ram JCA (later FCJ) writing for this court in *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 had occasion to consider the issue of delay and this was what His Lordship said (see pp 229–230 of the report):
>
> > The delay point
> >
> > It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim vigilantibus, non dormientibus, jura subveniunt, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.
> >
> > *In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it*. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.
> >
> > The point that is presently under consideration has been authoritatively stated in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30. It is a decision of the Federal Court and therefore quite plainly binds this court. There, Edgar Joseph Jr FCJ, said (at p 36):
> >
> > > *The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside ex debito justicie*, that is to say, irrespective of the merits and without terms. *Having said that it should be added that the application to set aside such a judgment should be made: (a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity* (see O 2 r 2(1) of the Rules of the High Court 1980). (Emphasis added.)

[36] It is interesting to note that both the Federal Court in *Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd* [2006] 5 MLJ 21 (FC) and the Court of Appeal in *Malayan Banking Bhd v Koay Kang Chuwan & Anor* [2010] 5 MLJ 46 cited the same case of *Tuan Haji Ahmed Abdul*

Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 for their propositions on delay.

[37] A closer reading of all these three cases shows that the fresh suit or application to set aside an earlier order should be made:

(a) with reasonable promptitude, in other words within a reasonable time;

(b) supported by explanation for any delay; and

(c) before the defendant has taken any fresh step after becoming aware of the irregularity.

Badiaddin today

[38] *Badiaddin* is still good law unless and until varied or reviewed by a subsequent Federal Court decision. Until that happens, based on *Badiaddin* and the cases set out above, the following principles can be distilled. A fresh suit can only be filed to set aside an order regularly obtained that has been drawn up:

(a) in the limited categories of illegality, lack of jurisdiction or fraud;

(b) the contravention of a statute should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction;

(c) the contravention of a procedural requirement of a statute is not a ground for a fresh suit to set aside the earlier regular judgment;

(d) the fresh suit or application to set aside should be made with reasonable promptitude, in other words within a reasonable time, supported by explanation for any delay and before the defendant has taken any fresh step after becoming aware of the irregularity;

(e) the discretion to invoke the inherent jurisdiction should be exercised judicially only in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice; and

(f) in all other cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within these special exceptions.

Application of law to the facts of this case

[39] In this originating summons the plaintiff relied on two grounds to set aside the order for sale. They are:

(a) the order for sale did not comply with s 8(2A) of the Bankruptcy Act

1967 as CIMB had claimed for interest accruing on the loan after the making of the receiving order on the second defendant; and

(b) the supporting affidavit affirmed in the foreclosure originating summons, by CIMB, failed to comply with O 83 r 3(3) of the Rules of Court 2012 as *no particulars* of the amount remaining due under the charge as at the hearing date of the originating summons was furnished. (Emphasis added.)

Do the two grounds satisfy the test set out in *Badiaddin?*

[40] These two grounds, even if we assumed for a moment are valid, do not satisfy the test set out in *Badiaddin*. They do not fall within the limited categories of illegality, lack of jurisdiction or fraud. The alleged contraventions of s 8(2A) of the Bankruptcy Act 1967 and O 83 r 3(3) Rules of Court 2012, even if true, are mere procedural contraventions and do not strike at the very heart or essence of the charge.

Has the plaintiff explained the delay in her originating summons application?

[41] The plaintiff had failed to explain in her two affidavits the delay in her originating summons application save to put the blame on her previous sets of solicitors (see reply affidavit of Shu Fong Yean dated 25 November 2022 at para 11).

[42] Further, the facts show that prior to the filing of this originating summons, the plaintiff's solicitors appeared in court on her behalf not to disagreed with the auction but to resist the reduction of the reserve price. She then asked CIMB to reschedule their repayments. Thereafter, her solicitors then requested for the redemption statement. CIMB had agreed to withhold enforcement proceedings on the order for sale based on her requests. Such facts do not satisfy the test in *Badiaddin*, to quote, 'there is a real need to set aside the defective order to enable the court to do justice'.

On the merits

[43] In any event even assuming the plaintiff satisfies the test set out in *Badiaddin* there are no merits in the two grounds relied on by the plaintiff to set aside the order for sale.

First ground — Allegation that the order for sale did not comply with s 8(2A) of the Bankruptcy Act 1967

[44] Section 8(2A) of the Bankruptcy Act 1967 reads as follows:

8 Effect of receiving order

...

(2A) Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order.

[45] The plaintiff alleged the order for sale had breached s 8(2A) of the Bankruptcy Act 1967 as CIMB had claimed for interest accruing on the loan after the making of the receiving order on the second defendant on 25 June 2017.

[46] CIMB relies on cl 2.1 of the charge (see supporting affidavit at exh S4) which states expressly that in the event one of the borrowers is declared a bankrupt the other borrower ie the plaintiff, who is not a bankrupt, is under a legal obligation to pay interest notwithstanding s 8(2A) of the Bankruptcy Act 1967.

[47] Under Malaysian law, joint borrowers of a loan are, in the absence of an express agreement to the contrary, each liable to the lender to repay the full liability for the loan. This is clearly stated in s 44(1) of the Contracts Act 1950 (see *Kiranjit Kaur a/p Dr Jagjit Singh (menyaman dalam keupayaan sebagai pentadbir bersama harta pusaka Suresh a/l Thanabalasingam, si mati) v Thamabalasingam @ Thanabalasingam (disaman dalam keupayaan sebagai pentadbir bersama harta pusaka Suresh a/l Thanabalasingam, si mati)* [2022] MLJU 829; [2022] 6 MLRH 549 (HC) [119]–[120]).

[48] The Federal Court in *Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie* [2021] 5 MLJ 253 (FC) has this to say of Section 44(1) of the Contracts Act 1950. I respectfully adopt the same. Nallini Pathmanathan FCJ (delivering judgment of the court) said:

The position in Malaysia

[24] In this jurisdiction in any event, the common law is inapplicable, as we are governed by the Contracts Act 1950. *Section 44 of the Contracts Act 1950 (Act 136) ('the Contracts Act') is the relevant provision relating to joint liability. It states:*

(1) When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of the joint promisors to perform the whole of the promise. (Emphasis added.)

[25] Section 44 of the Contracts Act is in pari materia with s 43 of the Indian Contract Act 1872. In *Re Vallibhai Adamji*, BJ Wadia observed that the provision:

... makes the liability on all contracts joint and several, and allows the promisee to sue one or more of the several joint promisors as he chooses, and excludes the right of any one of them to be sued along with his co-promisor or co-promisors.

(See also: *Union of India v East Bengal River Steamer Service Limited* 1963 Indlaw CAL 177; AIR 1964 Cal 196.)

[26] *In summary therefore, unless a contrary intention is expressed in the contract, all joint contracts effectively impose a full liability for the debt on each of the promisors*, by virtue of s 43 of the Indian Contract Act 1872: see Pollock & Mulla: Indian Contract and Specific Relief Acts, Vol 1 (13th Ed, India: LexisNexis, 2009) at pp 1043–1044. Thus, where the debts are jointly incurred, each promisee is liable for the whole amount: *Dhanki Mahajan vs Rana Chandubha Wakhatsing & Ors* 1969 AIR 69. (Emphasis added)

[49] The plaintiff had signed the charge. She is bound by its terms. There are really no merits with respect to the contention of the plaintiff in the face of cl 2.1 of the charge.

Second ground — Allegation that the supporting affidavit affirmed in the foreclosure originating summons, by CIMB, failed to comply with O 83 r 3(3) of the Rules of Court 2012

[50] The plaintiff contends that the supporting affidavit affirmed in the foreclosure originating summons, by CIMB, failed to comply with O 83 r 3(3) of the Rules of Court 2012 as *no particulars* of the amount remaining due under the charge as at the hearing date of the originating summons was furnished. (Emphasis added.)

[51] Order 83 r 3(3) of the Rules of Court 2012 states as follows:

3 Action for delivery of possession or payment of moneys (O 83 r 3)

...

(2) *Where the plaintiff claims delivery of possession* the affidavit shall show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, *the particulars of the amount remaining due under the charge as at the hearing date of the originating summons*. (Emphasis added.)

[52] CIMB contends O 83 r 3(3) of the Rules of Court 2012 does not apply as CIMB is not claiming for delivery of possession. I agree. Nowhere in the order for sale dated 2 July 2019 is there an order for delivery of possession. The order for sale can be seen in supporting affidavit at exh S1.

[53] In any event, CIMB contends that assuming that O 83 r 3(3) of the Rules of Court 2012 is applicable, it had given the particulars of the amount remaining due under the charge as at the hearing date of the originating summons. As evidence, CIMB refers to the statement of account exhibited in the supporting affidavit at exh S5.

[54] I agree. In the statement of account exhibited in the supporting affidavit at exh S5, CIMB had clearly stated: A

> The above matter refers.
>
> We furnish herewith the statement of account as at 02.07.2019 for your further action. B
>
> *8002284695*
>
> a. Amount Outstanding as at 02.07.2019 RM 479,351.50
>
> *8002341093*
>
> a. Amount Outstanding as at 02.07.2019 RM 398,894.23 C

[55] Further, the plaintiff had never identified what are these 'particulars' that CIMB had failed to show. The plaintiff in its written submissions had been vague on what particulars CIMB had failed to state other than rely on the Court of Appeal case of *Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd* [2003] 4 MLJ 409 which held that a chargor must give the particulars required under O 83 r 3(1) of the Rules of the High Court 1980. D

[56] I have two observations to make. First, the Court of Appeal case of *Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd* [2003] 4 MLJ 409 (CA) went up on appeal and the decision is reported as *Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd* [2006] 5 MLJ 21 (FC). E

[57] Second, *Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd* [2006] 5 MLJ 21 (FC) is actually a case on O 83 r 3(1) of the Rules of the High Court 1980, the predecessor to our Rules of Court 2012. F

[58] In O 83 r 3(1) of the Rules of the High Court 1980 there is a requirement to state the amount of the advance, the amount of the repayments, the amount of any interest or instalments in arrears at the date of issue of the originating summons and at the date of the afidavit; and the amount remaining due under the charge. The requirement to state such particulars was deleted in the new O 83 r 3(3) of the Rules of Court 2012. G H

[59] A case on point is *CIMB Islamic Bank Bhd v David Chua Kok Tee* [2022] MLJU 537 where Azlan Sulaiman JC said:

> [21] I would also reject this contention. *All that the plaintiff needs to adduce under sub-r 3(3) and 3(6) are particulars of the amount remaining due under the charge as at the date of hearing.* The Latest Statement of Account does that. *Order 83 r 3(3) and 3(6) of the Rules of Court, 2012 do not require the plaintiff to provide any explanation or particulars as to how these amounts were derived.* I
>
> [22] *As for the case of Bank Pertanian Malaysia v Zainal Abidin bin Kassim & Anor*

A [1995] 2 MLJ 537 the defendant relies on, I would distinguish it on the simple fact that it was decided under the previous Rules of the High Court, 1980 then in force. At the time, O 83 r 3(3) and 3(6) of those Rules required the charge to adduce these details for the hearing of the originating summons:

B
(a) the amount of the advance;

(b) the amount of the repayments;

(c) the amount of any interest or instalments in arrears at the date of issue of the originating summons and at the date of the affidavit; and

C
(d) the amount remaining due under the charge.

[23] *Under the current O 83 r 3(3) and 3(6) the chargee need only provide the amount remaining due under the charge.*

[60] Therefore, I hold that there are no merits in the second issue raised by D the plaintiff that the supporting affidavit affirmed in the foreclosure originating summons, by CIMB, failed to comply with O 83 r 3(3) of the Rules of Court 2012.

DECISION

E

[61] I therefore dismiss the plaintiff's originating summons with costs.

POSTSCRIPT

F **[62]** I would observe that even if the order for sale is set aside, the loan still has to be repaid by the plaintiff. It does not go away. CIMB is always at liberty to refile a fresh foreclosure.

Plaintiff's application dismissed.

G

Reported by Ashok Kumar

H

I